Petition not printed

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Supreme Court of the United States

October Term, 1942.

No. 441.

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PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

DIANA BECK,
Petitioner (Defendant-Appellant Below).

MEMORANDUM OPPOSING PETITION FOR A WRIT OF CERTIORARI.

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PEOPLE OF THE STATE OF NEW YORK,
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against

DIANA BECK,
Petitioner (Defendant-Appellant Below).

MEMORANDUM OPPOSING PETITION FOR A WRIT OF CERTIORARI.

Statement.

The petitioner (defendant-appellant below), the proprietor of a beauty parlor in the Village of Brewster, State of New York, was found guilty in the Justice's Court of that village of violating §564, subdivision 2 of Article 19 of the Labor Law of the State of New York. That section of Article 19, set out in full in Appendix "A" to this Memorandum, provides that an employer who pays any woman or minor employee less than the rates applicable under a mandatory minimum wage order shall be guilty of a misdemeanor. Petitioner failed to pay a woman employee the rates prescribed by Mandatory Order No. 2, the wage order

promulgated by the Industrial Commissioner of the State of New York to govern wages in beauty occupations (Appendix "B").

The judgment of conviction was affirmed by the County Court of Putnam County, State of New York, on September 22, 1941 (R. 14-23).* Associate Judge Finch of the Court of Appeals of the State of New York granted leave to appeal to that Court directly from the County Court on questions of Law (R. 10-13). The Court of Appeals affirmed the conviction in a decision rendered without opinion, on April 24, 1942. Subsequently the remittitur of the Court of Appeals to the County Court of Putnam was amended three times by orders of the Court of Appeals of June 4, 1942, June 15, 1942 and October 27, 1942, respectively. The remittitur of the Court of Appeals was last amended to read as follows:

> "Judgment affirmed.
>
> The defendant argued (1) that Article 19 of the Labor Law of the State of New York is violative of, and repugnant to, the Fourteenth Amendment of the Constitution of the United States; and (2) that Sections 110, 111 and 112 of said Labor Law, are violative of, and repugnant to, the Fourteenth Amendment of the Constitution of the United States. This court held that said Article 19 of the Labor Law of the State of New York, and Sections 110, 111 and 112 of said Labor Law are not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States."

Opinions of the Courts Below.

The opinion of the County Court of Putnam is found at pages 5-8 of the Record before the Court of Appeals (R. 14-

* This and other such references are to folios of the Record before the Court of Appeals.

23). The original decision of the Court of Appeals, without opinion, is reported at 288 N. Y. (Mem.) 93.

Jurisdiction.

Jurisdiction of this Court is claimed under §237(b) of the Judicial Code, as amended [U. S. C. A. Title 28; §344 (b)]. Furthermore, respondent respectfully calls to the attention of this Court Rule 38(5) of the Supreme Court Rules indicating the criteria for use of the Court's discretion in passing upon petitions for writs of certiorari.

Questions Presented.

1. Does Article 19 of the Labor Law of New York State violate the Fourteenth Amendment of the Federal Constitution?

2. Does §564(2), in particular, providing penalties for failure to comply with mandatory minimum wage orders, offend the Fourteenth Amendment of the Federal Constitution?

3. Is the exclusive procedure in the New York State Labor Law for review of the reasonableness of minimum wage orders repugnant to the Fourteenth Amendment of the Federal Constitution?

Summary of Argument.

1. Petitioner contends Article 19 of the New York State Labor Law is invalid in ~~two~~ three respects: (a) it is contended that the public policy enunciated therein transcends State police powers; (b) it is argued that said Article is an

invalid delegation of powers under the State Constitution; and (c) that the administrative officials are given "arbitrary" powers. The decision of this Court in *West Coast Hotel Company v. Parrish*, 300 U. S. 379, sustaining similar legislation of the State of Washington, furnishes a complete answer to the first objection (a). The second contention (b) that authority has not been delegated to the Industrial Commissioner by the State Legislature under Article 19 in conformity with the State Constitution, presents no Federal question for review by this Court. The argument that the delegation of such authority is "arbitrary" (c) and thereby repugnant to the Federal Constitution is entirely lacking in merit.

2. Petitioner contends that §564, subdivision 2 of Article 19 of the Labor Law "confers upon the Commissioner of Labor, legislative power to declare and fully define a crime and is a violation of Article III, Section 1, of the Constitution of the State of New York", and the Fourteenth Amendment of the Federal Constitution. Petitioner's premise that the Industrial Commissioner may define a crime is false. In any event the objection to the mode of delegation of powers under the State Constitution presents no Federal question. Nor is there any merit to the further suggestion that the definition of a crime in §564, subdivision 2 is too vague and uncertain to satisfy due process of law.

3. Petitioner challenges the validity, under the Federal Constitution, of the exclusive method of procedure prescribed by the New York State Labor Law for testing the reasonableness of minimum wage orders. Petitioner's rights are adequately protected by the procedure contested herein. In the light of prior decisions of this Court and

well settled administrative and constitutional law doctrine the requirements of "due process of law" under the Fourteenth Amendment are fully complied with by the Labor Law, and petitioner does not present a substantial Federal question in attacking said law.

Because petitioner failed to follow the prescribed exclusive procedure the questions of reasonableness of Mandatory Order No. 2, dealt with in petitioner's supporting brief, are not in issue.* The remittitur of the Court of Appeals as finally amended and quoted above indicates that such questions were not passed upon below.

Statutes.

Article 19 and §§110, 111 and 112 of the Labor Law are set out in full in Appendix "A" to this Memorandum.

ARGUMENT.

POINT I.

The decision of the New York State Court of Appeals herein, sustaining Article 19 of the Labor Law, is in accord with the decision of this Court in West Coast Hotel Company v. Parrish.

This Court, in 1936, declared invalid the New York State Minimum Wage Law for women and minors enacted in 1933 (Laws of 1933, Chapter 584; Article 19 of the Labor Law). *Morehead v. New York ex rel. Tipaldo,* 298 U. S. 587. The decision was based upon the authority of the earlier holding of this Court in *Adkins v. Children's Hos-*

* These are the issues involving "guaranteed wages", "apprentices", and "tips".

pital, 261 U. S. 525 (1923). In 1937, in the case of *West Coast Hotel Co. v. Parrish,* 300 U. S. 379, this Court finally swept aside the above decisions, expressly overruling the *Adkins* case. In the *West Coast Hotel* case the minimum wage law for women and minors of the State of Washington was upheld.

Announcement of the latter decision was the cue for the New York State Legislature to enact a new wage law closely paralleling in every essential detail the Washington Statute (Laws of 1937, Chapter 276; Article 19 of the present Labor Law). It is that law which petitioner asks this Court to review.

Petitioner attacks the underlying policy of Article 19 of the New York State Labor Law stated in §551 as follows:

> "It is the declared public policy of the state of New York that women and minors employed in any occupation should receive wages sufficient to provide adequate maintenance and to protect their health."

The same challenge has already been met in the case of *West Coast Hotel Co. v. Parrish.* The realization that inadequate wages exerted a pernicious effect on the health of women and minors prompted the Legislature of the State of Washington to enact the Statute upheld in that case (300 U. S. 379, 386-7).

In addition to persistent rattling of the bones of the *Adkins* case, petitioner speaks vaguely of a "new broad policy" allegedly fatal to the New York statute. This contention seems to be based upon the recognition in §550 that the welfare of women and minor employees is related to the "public interest of the community at large in their health and well-being, as well as for the protection of trade and industry." Obviously the regulation herein as well as that

sustained in the *West Coast Hotel* case is a valid exercise of State police powers for the precise reason that it has been "adopted in the interests of the community" (300 U. S. 379, 391, 399).

Petitioner's challenge to the validity of Article 19 of the Labor Law of this State relates principally to the delegation of legislative powers to the Industrial Commissioner. It is asserted in this regard that the Legislature failed to comply with Article III, §1 of the New York State Constitution (Petitioner's Brief, page 1A). The implicit holding of the Court of Appeals that authority has been properly delegated to administrative officials by Article 19 in conformity with the State Constitution presents no federal question for review by this Court.

Neblett v. Carpenter, 305 U. S. 297, 302, rehearing denied, 305 U. S. 675;
Ohio v. Akron Park District, 281 U. S. 74, 79;
Welch v. Swasey, 214 U. S. 91, 104.

Apart from the question of delegation of powers petitioner alleges that various sections of Article 19 violate the due process clause of the Fourteenth Amendment of the Federal Constitution. The basis for this contention is not entirely clear. Generally petitioner appears to object that the Industrial Commissioner and wage boards have been given excessive, discretionary, and arbitrary powers. A cursory examination of the structure of Article 19 is sufficient to demonstrate the lack of merit in petitioner's claim.

In establishing minimum wage rates three factors are to be taken into account by the administrative officers (§555):

"the amount sufficient to provide adequate maintenance and to protect health";

"the value of the service or class of service rendered"; and

"the wages paid in the state for work of like or comparable character".

In this respect the New York statute is even more explicit and restrictive than the Washington statute upheld in the *West Coast Hotel* case. In the Washington Statute only the factor of adequate maintenance costs was expressed. The factor of value of services rendered was supplied by implication (300 U. S. 379, 396).

In other respects Article 19 is constructed along the lines of the Washington statute and the Federal Fair Labor Standards Act which won the stamp of approval of this Court in the *West Coast Hotel* case (300 U. S. 379, 387) and in the case of *Opp. Cotton Mills, Inc. v. Administrator* (312 U. S. 126) respectively. In fact the Court noted that the latter Act was modelled upon the New York State statute.

Article 19 has been designed to encourage careful and scientific preparation and deliberation and to preclude "arbitrary" action by the officials charged with the formulation of the wage rates. Facts and statistics compiled by the investigating staff of the Industrial Commissioner relevant to a particular occupation are placed before an independent wage board consisting of representatives of employers, employees, and members of the public experienced in and conversant with the occupation (§§554, 556). The wage board is given subpoena powers and may summon its own witnesses (§556). Rates recommended by the wage board must not exceed costs of adequate maintenance (§556, subd. 5). The Industrial Commissioner may suggest subsidiary regulations but any basic wage rates must be finally evolved by a wage board (§557).

It is presumed that the Industrial Commissioner and the members of the wage boards will discharge their duties honestly, will faithfully apply the criteria expressed in Article 19 in formulating wage orders, and will not act arbitrarily. *New York ex rel. Lieberman v. Van de Carr,* 199 U. S. 552.

The fact that in various sections of Article 19 the word "may"—permissive in its popular sense—is used instead of the word "must" does not invalidate our law. The legislative history of Article 19 clearly reveals an intent to require application of the defined criteria by those entrusted with the task of formulating wage rates. If the word "may", although permissive in its literal sense, must be given a technical mandatory construction in order to fulfill constitutional requirements, then the Court of Appeals inferentially gave the word just such a construction. And the Court of Appeals would have complied with uniformly accepted canons of statutory interpretation in so doing.

Crawford, *The Construction of Statutes* (1940), §§261, 266.

People v. DeRenna, 166 Misc. (N. Y.) 582 (and see authorities collected therein).

People ex rel. Conway v. Supervisors, 68 N. Y. 114, 119.

POINT II.

Section 564, Subdivision 2, of the Labor Law does not confer upon the Industrial Commissioner the power to declare and define a crime.

Petitioner contends that §564(2) confers upon the Industrial Commissioner the power to define a crime, and

that it is thereby unconstitutional as (1) an improper delegation of legislative power under the New York State Constitution (Art. III, §1) and (2) violates the Fourteenth Amendment of the Federal Constitution.

Section 564(2) provides that an employer who pays less than the rates prescribed by a mandatory wage order "shall be guilty of a misdemeanor", and subject to certain penalties upon conviction. Thus the statute itself, and not the mandatory order promulgated by the Industrial Commissioner, creates the misdemeanor. Petitioner has failed to grasp the distinction drawn by the New York and Federal Courts between (a) a grant of authority to a public officer or administrator to determine which, if any, of his regulations shall be deemed a crime *(People v. Ryan,* 267 N. Y. 133), and (2) statutes like §564(2) where the Legislature validly delegates to the administrator power to make rates or regulations *and* further provides that a violation of any and all of such rates or regulations properly promulgated shall be punished as provided by law.

United States v. Grimaud, 220 U. S. 506;
Darweger v. Staats, 267 N. Y. 290, 306.

In any event, as pointed out above in this Memorandum the question of the propriety of a delegation of powers by the Legislature under a State Constitution presents no Federal question for review by this Court.

Petitioner interposes a separate objection in the allegation that §564(2) is "vague and indefinite" (Petitioner's Brief, page 23) and thereby violates the due process clause of the Fourteenth Amendment of the Federal Constitution. The "applicable rates" to which §564(2) has reference, in defining the misdemeanor, are those fixed by the mandatory

order, in this case Mandatory Order No. 2. Petitioner does not concede a total lack of understanding of the text and purport of Mandatory Order No. 2. Surely, then, §564(2), read in connection with a particular mandatory order, is sufficiently explicit and informative to meet the requirements of due process of law enunciated in the authorities cited by petitioner. *Whitney v. California*, 274 U. S. 357, 368; *Connally v. General Construction Co.*, 269 U. S. 385.

POINT III.

The exclusive procedure in the Labor Law for review of the reasonableness of minimum wage orders is not repugnant to the Fourteenth Amendment of the Federal Constitution.

The Court of Appeals upheld §§110, 111, 112 and 562 of the Labor Law prescribing an exclusive remedy for those who feel themselves aggrieved by a wage order. Consequently the Court of Appeals refused to pass upon the question of the validity of Mandatory Order No. 2 in this criminal proceeding. But respondent has never contended—as petitioner intimates—that the courts in a criminal prosecution are precluded from passing upon the validity of Article 19. That article was in fact reviewed and sustained by the Court of Appeals herein.

Section 562 of the Labor Law provides with respect to review of wage orders:

> "All questions of fact arising under this article except as otherwise herein provided shall be decided by the commissioner and there shall be no appeal from his decision on any such question of fact, but there shall be a right of review by the board of standards and appeals and the courts as provided in article three

of this chapter from any ruling or holding on any question of law included or embodied in any decision or order."*

This section must be read together with the procedural requirement of Article III. Section 110 (1) reads:

"1. Any person in interest or his duly authorized agent may petition the board of standards and appeals for a review of the validity or reasonableness of any rule or order made under the provisions of this chapter.

"2. * * * The filing of such petition shall operate to stay all proceedings under such rule or order until the determination of such review."

Court review of the "validity or reasonableness" of an order of the Industrial Commissioner was expressly confined to the New York State Supreme Court, but only after proper resort to the administrative agency (§ 111).

Section 112 (1) precisely expresses the Legislature's desire to prevent any Court from passing upon the validity of a wage order other than the Supreme Court pursuant to the above sections. The section reads:

"Every provision of this chapter and of the rules made in pursuance thereof, and every order directing compliance therewith, *shall be valid unless declared invalid in a proceeding brought under the provisions of section one hundred and ten. Except as provided in section one hundred and eleven, no court shall have jurisdiction to review or annul any such provision or order or to restrain or interfere with its enforcement.*" (Italics supplied.)

Application of the above scheme has not deprived petitioner of any constitutional rights.

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* An amendment to § 562, effective after the commencement of the prosecution herein, provided for appeal directly to the Appellate Division of the Supreme Court from decisions of the Board. L. 1942, c. 693, eff. May 6. 1942.

The rationale of the firmly established principle that the legislative branch of government will not violate the requirements of "due process of law" by confining remedies to a prescribed procedure such as found in Article III has been summed up by former Chief Justice Hughes of the United States Supreme Court:

> "* * * the substitution of an exclusive remedy directly against the Government is not an invasion of constitutional right. Nor does the requirement of recourse to administrative procedure establish invalidity if legal rights are still suitably protected."
>
> *Anniston Manufacturing Co. v. Davis,* 301 U. S. 337, 343 (1937).
>
> [And see *Myers v. Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 50 (1938);
>
> *Lewis v. City of Lockport,* 276 N. Y. 336, 343 (1938).]

The fact that the individual contesting the administrative order has been called before the criminal bar does not alter the application of the principle. If "suitably protected", his duty to resort to the administrative procedure may not be avoided. The defendant in this prosecution may look to section 112 (2) of Article III for ample protection. That section provides as follows:

> "Every such provision, rule or order shall in a prosecution or action to impose a penalty for its violation be deemed valid unless prior thereto such provision, rule or order has been revoked or modified by the board or annulled by a court pursuant to sections one hundred and ten and one hundred and eleven, or unless such proceeding is pending, *in which case the prosecution or action shall be stayed by the court pending the final determination thereof."* (Italics supplied.)

This stay of prosecution operates automatically *(Scheier v. Mitchell,* 188 App. Div. 182, 1st Dept., 1919).

The New York State Courts have upheld similar exclusive administrative procedures restricting rights of review in criminal proceedings.

People v. Calvar Corporation, 286 N. Y. 419;
People v. Ludwig, 262 App. Div. 912.

In two cases argued before this Court parties threatened with statutory penalties (*St. Louis, etc. Ry. Co. v. Alabama Public Service Commission*, 279 U. S. 560, 563), and deportation (*United States v. Sing Tuck*, 194 U. S. 161), both in the nature of criminal penalties, were denied affirmative judicial relief in the absence of prior resort to prescribed administrative remedies.

Petitioner has alluded vaguely to a requirement of due process of law that administrative agencies prepare "findings". Minimum wage orders promulgated under Article 19 applicable generally to an entire industry are "clearly legislative in character".

Benjamin, *Report on Administrative Adjudication in the State of New York* (1942), pp. 203-4.

Administrative regulations in that category need not be accompanied by formal "findings" as in the case of determinations by "quasi-judicial" agencies.

Pacific States Box & Basket Co. v. White, 296 U. S. 176, 186.

In any event there is no element of surprise to frustrate those seeking to review wage orders under the New York Labor Law. Recommendations of wage boards upon which rates are ultimately predicated are published. Petitioners before the Board of Standards and Appeals have free access to factual material compiled by the Industrial Commissioner and submitted originally to the wage boards. Furthermore the Board customarily renders full opinions

explaining its decisions in order to facilitate judicial review therefrom.

Petitioner alleges the above procedure is repugnant to the Fourteenth Amendment on the ground that § 562 precludes appeal from decisions of the Industrial Commissioner on questions of fact. Statutes giving finality to decisions of administrative officials need not violate due process of law.

Int. Com. Comm. v. Union Pacific R. R., 222 U. S. 541, 543.

Helfrick v. Dahlstrom Metallic Door Co., 256 N. Y. 199, aff'd 284 U. S. 594.

Gudmunson v. Cardillo, 126 F. (2d) 521, 524.

Constitutional demands will be satisfied if, in attacking regulations of a "legislative" character such as wage orders under Article 19, the complainant is permitted a hearing at some stage or other in a review proceeding. The New York State Labor Law affords two opportunities for those challenging wage orders to be heard: public hearings conducted by the Industrial Commissioner before a wage order is made directory (§ 557), or mandatory (§ 559), or before any regulations are modified (§ 561); and the privilege of a second hearing before the Board of Standards and Appeals is provided for review of wage orders when promulgated. Interested parties are given complete freedom in introducing factual evidence at the public hearings. And in a proceeding before the Board of Standards and Appeals petitioners may

> "challenge the facts on which the minimum wage order rests, and may introduce controverting evidence. But if that is done, the issue before the Board is not an original issue as to the correctness, in the Board's judgment, of the facts asserted as the basis of the quasi-

legislative action; it is, rather, an issue of law (similar to that in judicial proceedings challenging the validity of legislation under the due process clause) whether there is rational foundation for the quasi-legislative action."

Benjamin, *supra*, p. 204.

Pacific States Box & Basket Co. v. White, 296 U. S. 176.

Respondent respectfully submits that petitioner has failed to present a substantial Federal question for review by this Court and asks that the petition for a writ of certiorari be denied.

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APPENDIX "A"

NEW YORK STATE LABOR LAW—ARTICLE 3—REVIEW BY INDUSTRIAL BOARD AND COURT.

§ 110. Review by board of standards and appeals

1. Any person in interest or his duly authorized agent may petition the board of standards and appeals for a review of the validity or reasonableness of any rule or order made under the provisions of this chapter.

2. The petition shall be verified, shall be filed in duplicate with the board of standards and appeals and shall state the rule or order proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections to the rule or order not raised in the petition shall be deemed waived. The board may join in one proceeding all petitions alleging invalidity or unreasonableness of substantially similar rules or orders. The filing of such petition shall operate to stay all proceedings under such rule or order until the determination of such review.

3. The board shall order a hearing if necessary to determine the issues raised, or if the issues have been considered in a prior proceeding the board may, without hearing, confirm its previous determination. Notice of the time and place of hearing shall be given to the petitioner and to such other persons as the board may determine.

4. If the board finds that the rule or order is invalid or unreasonable it shall revoke or amend the same.

5. The decision of the board shall be final unless within thirty days after it is filed one of the parties commences an action as provided in section one hundred and eleven.

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§ 111. Review by court

1. Any person in interest may bring an action in the supreme court against the department to determine the validity and reasonableness of any provision of this chapter or of the rules made in pursuance thereof or of any order directing compliance therewith, provided that no such ac-

tion to determine the validity and reasonableness of any rule or order shall be brought except as an appeal from the determination of the board as provided in section one hundred and ten.

2. If the action is an appeal from a determination of the board it shall file with the clerk of the court a certified copy of the record of its hearings in the matter.

3. The court may refer any issue arising in such action to the board for further consideration. At any time during such action the party appealing may apply to the court without notice for an order directing any question of fact arising upon any issue to be tried and determined by a jury, and the court shall thereupon cause such question to be stated for trial accordingly and the findings of the jury upon such question shall be conclusive. Appeals may be taken from the supreme court to the appellate division of the supreme court and to the court of appeals in such cases, subject to the limitations provided in the civil practice act.

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§112. Limited review of provisions of chapter and of rules and orders

1. Every provision of this chapter and of the rules made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of section one hundred and ten. Except as provided in section one hundred and eleven, no court shall have jurisdiction to review or annul any such provision or order or to restrain or interfere with its enforcement.

2. Every such provision, rule or order shall in a prosecution or action to impose a penalty for its violation be deemed valid unless prior thereto such provision, rule or order has been revoked or modified by the board or annulled by a court pursuant to sections one hundred and ten and one hundred and eleven, or unless such proceeding is pending, in which case the prosecution or action shall be stayed by the court pending the final determination thereof. If any such prosecution or action is commenced against a defendant who has not previously been served with an order

to comply with such provision, or who has been served with such an order but has not had a reasonable opportunity to comply therewith, and if within five days the defendant commences proceedings under the provisions of sections one hundred and ten and one hundred and eleven, the prosecution or action shall be stayed as if such proceeding were pending at the time it was commenced.

New York State Labor Law—Article 19—Minimum Wage Standards.

Minimum Wage Standards for Women and Minors

§ 550. *Factual background.* Women and minors are employed in some occupations in the state of New York for wages insufficient to provide adequate maintenance and to protect health and unreasonably low and not fairly commensurate with the value of the services rendered. Such a condition is contrary to public interest and public policy commands its regulation. Women and minors employed in such occupations are not as a class on a level of equality in bargaining with their employers in regard to minimum wage standards, and "freedom of contract" as applied to their relations with their employers is illusory. Judged by any reasonable standard, wages in such occupations are often found to be insufficient to provide adequate maintenance and to protect health and to bear no relation to the fair value of the services rendered. Women and minors employed for gain in such occupations are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum wage standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers and employees, reduces the purchasing powers of the workers, threatens the stability of industry and in many instances requires such wages to be supplemented by the payment of public moneys for relief or other

public assistance. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the state of New York are contrary to public policy and are such as to render imperative the reasonable exercise of the police power of the state to secure wages sufficient to provide adequate maintenance and to protect the health of women and minors; and to protect the public interest of the community at large in their health and well-being, as well as for the protection of trade and industry.

§ 551. *Statement of public policy.* It is the declared public policy of the state of New York that women and minors employed in any occupation should receive wages sufficient to provide adequate maintenance and to protect their health.

§ 552. *Definitions.* As used in this article: 1. "Commissioner" shall mean the industrial commissioner.

2. "Division" shall mean the division of minimum wage.

3. "Wage board" shall mean a board created as provided in this article.

4. "Woman" shall mean a female of twenty-one years or over.

5. "Minor" shall mean a person of either sex under the age of twenty-one years.

6. "Occupation" shall mean an industry, trade, business or class of work in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor on a farm.

§ 553. *Powers of investigation.* The commissioner shall have power: 1. To investigate and ascertain the wages of women and minors employed in any occupation in the state;

2. To enter the place of business or employment of any employer of women and minors in any occupation for the purpose of

a. examining and inspecting any and all books, registers, payrolls, and other records of any employer of women or minors that in any way appertain to or have a bearing upon the wages of any such women or minors,

b. ascertaining whether the orders of the commissioner have been and are being complied with;

3. To require from such employer full and correct statements in writing, at such times as the commissioner may deem necessary, of the wages paid to all women and minors in his employment.

§ 554. *Investigation of occupation.* The commissioner shall have power, and it shall be the duty of the commissioner on the petition of fifty or more residents of the state engaged in or affected by an occupation sought to be investigated, to cause an investigation to be made of the wages being paid to women or minors in any occupation to ascertain whether any substantial number of women or minors in such occupation are receiving wages which are insufficient to provide adequate maintenance and to protect their health. If, on the basis of information in his possession, with or without a special investigation, the commissioner is of the opinion that any substantial number of women or minors in any occupation or occupations are receiving such wages, he shall appoint a wage board to report upon the establishment of minimum wages for such women or minors in such occupation or occupations.

§ 555. *Basis of minimum wage.* In establishing a minimum wage for any service or class of service under this article the commissioner and the wage board without being bound by any technical rules of evidence or procedure:

(1) may take into account the amount sufficient to provide adequate maintenance and to protect health

(2) may take into account the value of the service or class of service rendered, and

(3) may consider the wages paid in the state for work of like or comparable character.

§ 556. *Wage boards.* 1. A wage board shall be composed of not more than three representatives of employers, an equal number of representatives of employees and of not more than three disinterested persons representing the public, one of whom shall be designated by the commissioner as chairman. The commissioner shall appoint the members of such wage board, the representatives of the employers and employees to be selected so far as practicable from nominations submitted by employers and employees in such occupation or occupations. Two-thirds of the members of

such wage board shall constitute a quorum and the recommendations or report of such wage board shall require a vote of not less than a majority of all its members. The members of a wage board shall be entitled to compensation at the rate of not exceeding ten dollars per day for each meeting attended by them, or each day actually spent in the work of the board. They shall also be paid their reasonable and necessary traveling and other expenses while engaged in the performance of their duties. The commissioner shall make and establish from time to time rules and regulations not inconsistent with this article governing the selection of a wage board and its mode of procedure.

2. The commissioner shall present to a wage board promptly upon its organization all the evidence and information in his possession relating to the wages of women and minor workers in the occupation or occupations for which the wage board was appointed and all other information which he may deem relevant to the establishment of a minimum wage for such women and minors, and shall cause to be brought before the wage board any witnesses whom he may deem material. A wage board may summon other witnesses or call upon the commissioner to furnish additional information to aid it in its deliberation.

3. A wage board shall have power to administer oaths and to require by subpoena the attendance and testimony of witnesses, and the production of all books, records, and other evidence relative to any matters under investigation. Such subpoenas shall be signed and issued by the chairman of the wage board and shall be served and have the same effect as if issued out of the supreme court. A wage board shall have power to cause depositions of witnesses residing within or without the state to be taken in the manner prescribed for like depositions in civil actions in the supreme court.

4. Within sixty days of its organization a wage board shall submit a report including its recommendations as to minimum wage standards for the women or minors in the occupation or occupations the wage standards of which the wage board was appointed to investigate. If its report is not submitted within such time the commissioner may appoint a new wage board.

5. The minimum wage standard recommended by a wage board shall not be in excess of an amount sufficient to provide adequate maintenance and to protect the health of the women and minors so employed.

6. A wage board may classify employments in any occupation according to the nature of the service rendered and recommend appropriate minimum wage rates for different classes of employment. A wage board may also recommend minimum wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality.

7. A wage board may recommend a suitable scale of rates for learners and apprentices in any occupation or occupations, which scale of learners' and apprentices' rates may be less than the minimum wage rates recommended for experienced women or minor workers in such occupation or occupations.

8. In addition to the report a wage board may recommend such regulations as it may deem appropriate to safeguard the minimum wage standards recommended in its report. Such regulations may among other things define and govern learners and apprentices, their rates, number, proportion or length of service, piece rates or their relation to time rates, overtime or part-time rates, bonuses or special pay for special or extra work, deductions for board, lodging, apparel or other items or services supplied by the employer, and other special conditions or circumstances; and in view of the diversities and complexities of different occupations and the dangers of evasion and nullification, without departing from the basic minimum rates recommended by the wage board the board may provide for such modifications or reductions of or additions to such rates in or for such special cases or classes of cases as those herein enumerated as the board may find appropriate to safeguard the basic minimum rates established.

§ 557. *Action on report of wage board.* 1. A wage board shall submit its report and recommendations to the commissioner who shall within ten days thereafter accept or reject such report. During such ten days he may confer with the wage board which may make such changes in the

report or recommendations as it may deem fit. If the report is rejected the commissioner shall resubmit the matter to the same wage board or to a new wage board. If the report is accepted it shall be published together with such of the regulations recommended by the board and with such modifications and amendments to the regulations as the commissioner may approve. The commissioner shall give notice of a public hearing to be held not sooner than fifteen nor later than thirty days after such publication at which all persons in favor of or opposed to the recommendations contained in such report or in such proposed regulations, may be heard.

2. Within thirty days after such hearing the commissioner shall approve or disapprove the report of the wage board. If the report is disapproved the commissioner may resubmit the matter to the same wage board or to a new wage board. If the report is approved the commissioner shall make a directory order which shall define minimum wage rates in the occupation or occupations as recommended in the report of the wage board and shall include the regulations as approved by the commissioner.

§ 558. *Special licenses.* For any occupation for which minimum wage rates have been established the commissioner may cause to be issued to a woman or minor, including a learner or apprentice, whose earning capacity is impaired by age or physical or mental deficiency or injury, a special license authorizing employment at such wages less than such minimum wage rates and for such period of time as shall be fixed by him and stated in the license.

§ 559. *Order made mandatory.* If at any time after a directory minimum wage order has been in effect for three months, the commissioner is of the opinion that the persistent non-observance of such order by one or more employers is a threat to the maintenance of the minimum wage standards in any occupation or occupations, the commissioner may give notice of his intention to make such order mandatory and of a public hearing to be held not sooner than fifteen nor later than thirty days after such publication at which all persons in favor of or opposed to a mandatory order may be heard. After such hearing the commissioner may make mandatory the previous directory order or any part thereof and shall publish such order.

§ 560. *Publication of names of employers not observing order.* If the commissioner has reason to believe that any employer is not observing the provisions of any directory or mandatory order, the commissioner may, on fifteen days' notice, summon such employer to appear to show cause why the name of such employer should not be published as having failed to observe the provisions of such order. After such hearing and the finding of non-observance of such order, the commissioner may cause to be published in a newspaper or newspapers published and circulating within the state of New York and/or in such other manner as he may deem appropriate, the name of any such employer or employers as having failed in the respects stated to observe the provisions of such order. Neither the commissioner nor any authorized representative of the commissioner, nor any newspaper publisher, proprietor, editor, nor any employee thereof shall be liable to an action for damages for publishing the name of any employer as provided for in this article, unless guilty of wilful misrepresentation.

§ 561. *Reconsideration of minimum wage order.* 1. At any time after a minimum wage order has been in effect for six months or more, whether during such period it has been directory or mandatory, the commissioner on his own motion or on a petition of fifty or more residents of the state engaged in or affected by the occupation to which the order is applicable, may reconsider the minimum wage rates set therein and reconvene the same wage board or appoint a new wage board to recommend whether or not the rate or rates contained in such order should be modified. The report of such wage board shall be dealt with in the manner prescribed in section five hundred and fifty-seven of this chapter, provided that if the order under reconsideration has theretofore been made mandatory in whole or in part then the commissioner in making any new order or confirming any old order shall have power to declare to what extent such order shall be directory and to what extent mandatory.

2. The commissioner may from time to time propose such modifications of or additions to any regulations included in any directory or mandatory order of the commissioner without reference to wage board, as he may deem appropriate to effectuate the purposes of this article, pro-

vided such proposed modifications or additions could legally have been included in the original order, and shall give notice of a public hearing to be held not less than fifteen days after such publication at which all persons may be heard in respect to such proposed modifications or additions. After such hearing the commissioner may make an order putting into effect such of the proposed modifications of or additions to the regulations as he may deem appropriate, and if the order of which the regulations form a part has theretofore been made mandatory in whole or in part, then the commissioner in making any new order shall have the power to declare to what extent such order shall be directory and to what extent mandatory.

§562. *Review of orders.* All questions of fact arising under this article except as otherwise herein provided shall be decided by the commissioner and there shall be no appeal from his decision on any such question of fact, but there shall be a right of review by the board of standards and appeals and the courts as provided in article three of this chapter from any ruling or holding on any question of law included or embodied in any decision or order.

§ 563. *Duty of employer.* In every occupation every employer of women and minor workers shall keep a true and accurate record of the hours worked by each, the cash wages paid by him to each and such other information as the commissioner in his discretion shall deem material and necessary and shall furnish to the commissioner or any duly authorized representative upon demand a sworn statement of the same. Such records shall be open to inspection by the commissioner or any duly authorized representative at any reasonable time. Every employer subject to a minimum wage order whether directory or mandatory shall keep a copy of such order posted in a conspicuous place in every room in which women or minors are employed. Employers shall on request be furnished copies of orders without charge. Employers shall permit the commissioner or any duly authorized representative to question any employee of such employer in the place of employment and during work hours in respect to the wages paid to and the hours worked by such employee or other employees.

§ 564. *Penalties.* 1. Any employer or his agent, or the officer or agent of any corporation, who discharges or in

any other manner discriminates against any employee because such employee has served or is about to serve on a wage board or has testified or is about to testify before any wage board or in any other investigation or proceeding under or related to this article or because such employer believes that said employee may serve on any wage board or may testify before any wage board or in any investigation or proceeding under this article shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars.

2. Any employer or the officer or agent of any corporation who pays or agrees to pay to any woman or minor employee less than the rates applicable to such woman or minor under a mandatory minimum wage order shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment of not less than ten nor more than ninety days or by both such fine and imprisonment, and each failure to pay any employee in any week the rate applicable under a mandatory minimum wage order or a rate in excess thereof shall constitute a separate offense.

3. Any employer or the officer or agent of any corporation who fails to keep the records required under this article or to furnish such records or any information required to be furnished under this article to the commissioner or any duly authorized representative upon request shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than twenty-five nor more than one hundred dollars, and each day's failure to keep the records requested under this article or to furnish such records or information to the commissioner or any duly authorized representative shall constitute a separate offense.

§ 565. *Civil Action.* If any woman or minor worker is paid by his employer less than the minimum wage to which he is entitled under or by virtue of a mandatory minimum wage order he may recover in a civil action the full amount of such minimum wage less any amount actually paid to him by the employer together with costs and such reasonable attorney's fees as may be allowed by the court, and any agreement between him and his employer to work for less than such mandatory minimum wage shall be no defense to such

action. At the request of any woman or minor worker paid less than the minimum wage to which he was entitled under a mandatory order the commissioner may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court.

§ 566. *Unconstitutionality.* If any provisions of this article or the application thereof to any person, occupation or circumstance, is held invalid the remainder of the article and the application of such provision to other persons, occupations or circumstances shall not be affected thereby.

APPENDIX "B"

MANDATORY ORDER NO. 2 FOR BEAUTY SERVICE OCCUPATIONS IN NEW YORK STATE as promulgated under Article 19 of the Labor Law of New York State.

Pursuant to the power in me vested as Industrial Commissioner under the Labor Law and particularly under Article 19 thereof, I hereby continue Directory Order No. 2 for the limited and sole purpose of its application to manicurists in barber shops; and I hereby make and publish the following Mandatory Order to become effective the 27th day of March, 1939, for all other beauty service occupations of this State:

Wage Rates

1. All employees shall be considered either full time or part time employees. Part time employees are those who are engaged for a period of one or more days of eight hours or less, but not exceeding three days in any week. All others are full time employees.

2. The minimum weekly wage for full time employees shall be $16.50, except for persons employed exclusively as maids. This wage shall apply to employment up to and including 45 hours in any one week.

3. The minimum weekly wage for full time maids shall be $15.00 for any period up to and including 45 hours.

4. For all full time employees, time and one-half rates shall be paid for each hour or fraction thereof after the 45th hour and up to the 48th hour in any week. Double time rates shall be paid for each hour or fraction thereof after the 48th hour in any one week.

5. The minimum wage for part time workers shall be $4.00 per day of eight hours or less. Any hour or fraction thereof in excess of eight in any one day for such part time workers shall be paid at the rate of time and one-half.

6. Employees engaged as part time workers who shall work more than three days in any week shall become full time workers and shall be entitled to the full time wage hereinabove provided.

7. The minimum weekly wage for full time employees shall not apply during the first week of employment of new employees who have been hired after the beginning of the week or who have been dismissed in good faith as unsatisfactory before the end of the week, nor to such employee who voluntarily absent themselves, nor to employees who are prevented from rendering service for more than six successive hours because of riot, act of God, or stoppage due to general breakdown of equipment. In such case the minimum weekly wage shall be pro-rated as follows: maids 34¢ per hours, and all other employees 37¢ per hour.

8. Employment for new employees shall be deemed to commence when the employee performs or is engaged to perform beauty service for or upon a customer.

In order to safeguard the foregoing minimum wage standards, I hereby make and publish pursuant to the authority of Article 19 of the Labor Law, the following Administrative Regulations which are hereby issued as part of this Mandatory Order.

Administrative Regulations

A — In no event may tips be counted as part of the minimum wage.

B — All persons who perform beauty service shall be deemed employees within the order unless and until

the Industrial Commissioner has ruled upon adequate proof that the order does not apply to them. The facts in each particular case are to be presented to the Industrial Commissioner under rules to be prescribed by her.

C — In the case of employees who are employed on a commission or other basis, wholly or partially, the commissions or monies earned and paid shall be credited against the minimum wage so that in no event shall the employee's remuneration be less than such minimum wage.

D — The minimum wage shall be subject to no deductions except as authorized by law.

E — The employer shall furnish to the employees cosmetics and supplies including, but not limited to, emery boards, orangewood sticks, combs, hairbrushes, nets, permanent wave rods and protectors, and linens. The employee shall furnish the implements including nippers, scissors, files, buffers, tweezers and marcel irons, except such as are part of shop equipment. Employers requiring their employees to wear uniforms shall make no charge therefor, or for the laundering or cleaning thereof, where such charge would bring the employee's wage below the minimum.

F — No charge shall be made to any employee for beauty service rendered in the place of employment.

G — No woman or minor whose earning capacity has been impaired may be paid at less than the minimum wage, until a special license, issued in accordance with the provisions of Section 558 of the Labor Law, has been obtained by the employer from the Division of Women in Industry and Minimum Wage.

H — With every wage payment to each employee subject to Mandatory Order No. 2, there shall be given a statement in the form prescribed by the Commissioner, explaining the rates and earnings received under this minimum wage order.

I — Records of hours, age, and wages of each employee shall be kept at the place of employment in the form prescribed by the Industrial Commissioner for a period of at least one year, and the employer shall on demand submit a sworn copy of such records to the Commissioner or her representative, together with

such information as the Commissioner in her discretion may deem necessary. Where time cards are used, they shall be kept for at least six months.

J — For purposes of this order each employer shall keep on file a certificate of proof of age for each male minor under 21 years of age employed at beauty service occupations.

K — A notice issued by the Department of Labor, setting forth the provisions of Mandatory Order No. 2 and administrative regulations, shall be posted in a conspicuous place where women and minors can read it.

DEFINITIONS

The term "beauty shop" shall mean any place or establishment where women or minors are employed for the purpose of rendering "beauty service."

"Beauty service" means all service or operations used or useful in the care, cleansing or beautification of the skin, nails or hair, or in the enhancement of personal appearance, and also services or operations incidental to such care, cleansing, beautification or enhancement, including the service of maids, cashiers, receptionists or appointment clerks.

Witness my hand and the seal of the Department of Labor, this 24th day of February, 1939.

FRIEDA S. MILLER
Industrial Commissioner

Seal